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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner

v.

BETTY DOLAR KAZUBOWSKI,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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INDEX

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2-3

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES 3-4

STATEMENT OF THE CASE 4

ARGUMENT 11

CONCLUSION 18

APPENDIX A. Illinois Supreme Court Rule 36 1

APPENDIX B. Rule 7.1 of Circuit Court 2

APPENDIX C. Opinion of Appellate Court 2

APPENDIX D. Decree of Circuit Court of August 31, 1966 . . . 11

APPENDIX E. Order of Circuit Court of September 15, 1966 . 18

APPENDIX F. Order re Equitable Alimony and Attorney's Fees of September 23, 1966 20

APPENDIX G. Order of Commitment of October 7, 1966 . . . 22

APPENDIX H. Order of Circuit Court of October 19, 1966 . . . 23

APPENDIX I. Order of Commitment for Contempt of October 25, 1966 28

APPENDIX J. Docket Entries of September 29, 1966 30

CITATIONS

CASES:

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 11

Belt v. Holton, 197 F.2d 579 (CADC 1952) 15

Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 677-8 12

Clawans v. White, 112 F.2d 189 (CADC) 15

Cochran v. Kansas, 316 U.S. 255 (1941) 15

Cole v. Arkansas, 333 U.S. 196, 201, 202 (1947) 13

Danziger v. Pittsfield Shoe Co., (S.Ct.Ill) 68 N.E. 534 (1903) . . . 12

Dowd v. Cook, 340 U.S. 206 (1950) 15

Frank v. Mangum, 237 U.S. 300, 327 (1915) 13, 15

Great Northern R Co. v. Sunburst Oil Co., 287 U.S. 358, 366-7 (1932) 12

Griffin v. Illinois, 351 U.S. 12 . . . . . 13, 15

Holt v. Virginia, 381 U.S. 131 (1965) 14

Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463 13

McClintock v. Helberg, (S.Ct.Ill.) 48 N.E. 145 (1897) 12

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 12

Moore Ice Cream Co. v. Rose, 289 U.S. 377, 384 (1932) 11

Pritchard v. Nelson, 55 F.Supp 506, 517 (W.D.Va. 1943), aff'd 137 F.2d 312 (C.A. 4, 1943) 14

Sanders v. Shaw, 244 U.S. 317 16

Treasure Imports Inc. v. Henry Amjur & Sons, 127 F.2d 3, 5 (C.A. 2, 1942) 15

United States v. Beebe, 180 U.S. 343, 351, 2 (1901); note 66 ALR 102, 107-8 12

United States v. Forness, 125 F.2d 928 15

Wetherbee v. Fitch, 117 Ill. 67, 75 (1886) 12

William Howard Hay Foundation v. Safety Harbor Sanatorium Inc., 141 F.2d 952 (C.A. 5, 1944) 15

OTHER AUTHORITIES

66 A.L.R. 102, 107, 108 12

Rules 75(a), (g), FRCP 15

Constitution of the State of Illinois, Art. 6, Sec. 7 11

Ch. 110, Ill. Rev. Stat. (1965 ed.) 74 11

Ch. 110, Ill. Rev. Stat. (1965 ed.) Sec. 101.36 14

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to the Appellate Court of Illinois, Third District, to review a judgment of that Court filed March 14, 1968, dismissing certain appeals and affirming certain decrees and orders from and of the Circuit Court of Henry County, Illinois.[1]

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[1] The record before this court includes the portion of the trial court record before the Appellate Court, designated by "R"; the record of proceedings in the Appellate Court, designated by "AR"; and the record of proceedings in the Illinois Supreme Court, designated by "S.Ct.R.". All records except that of the Supreme Court contain

OPINION BELOW

The opinion of the Appellate Court of Illinois rendered March 14, 1968, is reported in 99 Ill. App. 2d 126, 235 N.E. 2d 664 and is printed in the appendix herein at page 2 *et seq.*

JURISDICTION

The judgment or decree of the Appellate Court for the Third Appellate District of Illinois sought to be reviewed was entered March 14, 1968. No rehearing was requested. Petition for leave to appeal to the Supreme Court of Illinois was denied on September 23, 1968. On October 16, 1968 the Appellate Court entered its order staying its mandate for a period of 90 days from and after September 23, 1968. On December 13, 1968 an order was entered by the Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States, extending time to file petition for writ of certiorari to and including January 20, 1969. The jurisdiction of this court is invoked under 12 USC Sec. 1257.

QUESTIONS PRESENTED

Were the constitutional rights of the respondent to due process of law as a guarantee against deprivation of his liberty and his property, violated by proceedings in this case in the Illinois courts, set forth below, separately and in combination:

1. The decree of August 31, 1966, disposing of property jointly owned by petitioner and his former wife, and requir-

pages consecutively numbered to which reference is made by such numbering. The Supreme Court record is separated into numbered parts, indexed on the facing page; reference is here made to the part by such number, followed by the page number of the document comprising the part, when appropriate. The appendix hereto is designated "App.". Briefs of the parties in the Appellate Court have been lodged with the clerk of this court, being petitioner's principal and reply brief as Appellant, and respondent's brief as Appellee, certified by the clerk of the Appellate Court.

ing petitioner to pay her $20,500.00, with its sole basis a stipulation executed by petitioner's attorney without authority, as made known to the trial court prior to the entry of its decree; and the failure of the Appellate Court to reverse that decree.

2. The order of September 29, 1966 sustaining objections to petitioner's designation of the contents of the trial court record for inclusion in the record on appeal to the Appellate Court, thereby denying to petitioner the complete record on appeal regarded by him as essential for review of the trial court's action; and the failure of the Appellate Court to uphold petitioner's right to such complete record.

3. The order of September 23, 1966, directly and literally requiring petitioner to pay his former wife weekly alimony pending his appeal, in addition to the property settlement and lump sum alimony previously decreed in her favor, in full discharge and settlement of any and all rights to alimony, thus penalizing petitioner for taking an appeal to obtain the fair hearing denied him in the trial court.

4. The ruling of the Appellate Court that the completeness and adequacy of the portion of the trial court record before it, may be determined by that portion of that record, without regard to those portions of the trial court record which were omitted, although duly designated by petitioner.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV – Section 1.

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (15 Stat. 708 (1868), 1 USC p. XLVII)

"In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court in the district in which the Circuit is located. . . ." Article 6, Section 7, Constitution of the State of Illinois.

STATUTES

Method of review.

"(1) Every order, determination, decision, judgment or decree reviewable by the Supreme or Appellate Court of this State is subject to review by notice of appeal. The review shall be designated an appeal and constitutes a continuation of the proceeding in the trial court. . . ."

2 Illinois Revised Statutes 1965, Chapter 110, Sec. 74; Chapter 110, Smith Hurd Illinois Annotated Statutes (perm. ed. 1956) Sec. 74.

COURT RULES

2 Illinois Revised Statutes 1965 Chapter 110, Sec. 101.36, Chapter 110 Smith Hurd Illinois Annotated Statutes (perm. ed. 1956) Sec. 101.36 (App. 1).

2 Illinois Revised Statutes 1965 Chapter 110 Sec. 307.1 (App. 2).

STATEMENT OF THE CASE

Edward Kazubowski and respondent, his former wife, Betty Dolar Kazubowski, are residents of Kewanee, Illinois, a small town with a population of around 16,000 persons, located in Henry County within the 14th Judicial Circuit of Illinois. The County Seat is Cambridge.

This petition arises out of divorce proceedings instituted by respondent against petitioner in the Circuit Court of Henry County on November 23, 1965. The issues were tried before a jury which returned a verdict against petitioner. A divorce decree of June 13, 1966 reserved

jurisdiction for later disposition of property rights, and an award of alimony. (R 415)

On August 31, 1966 a supplementary decree (R 59, App. 11 *et seq.*) was entered transferring to respondent securities owned by petitioner, and awarding her the gross sum of $20,500.00, to be paid over a period of time. Of the total sum, $5,000.00 was to be in lieu of, and in full satisfaction of all rights to alimony. Payments of temporary alimony of $50.00 per week previously awarded respondent after the taking of testimony, were credited upon the gross sum of $20,500.00. The parties were required to pay the fees of their respective attorneys, and their respective debts and obligations, incurred since the filing of the suit, in November, 1965. Respondent was required to convey to petitioner her undivided half interest in the premises used by them as a home, and by petitioner, in addition, as his office for the practice of his profession of dentistry, but only upon discharge by petitioner of the obligations imposed upon him by the decree.

The sole basis for this decree was a document entitled "Stipulation", (R 14-17) executed by the attorneys for the parties on August 15, 1966.

The record conclusively establishes that the attorney for petitioner acted without authority from petitioner, in executing this stipulation.

The stipulation by its terms required petitioner to subject that realty to a second lien in favor of respondent for sums to be due her. (R 15) This undertaking was beyond petitioner's power to perform, in view of the two prior encumbrances.[2]

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[2]The complaint for divorce had included a prayer for partition of jointly held real estate. Petitioner's mother, Mary Kazubowski, for some years had held a note of petitioner, evidencing a loan made to him in the amount of $10,000.00. In view of the partition threat, she confessed judgment on that note shortly after the complaint was filed. She thereby acquired a lien upon petitioner's interest in the realty, subject only to a pre-existing, prior mortgage.

When petitioner learned of the stipulation, and the provision requiring him to give respondent a second lien, he promptly filed his written "Motion To Amend Stipulation Or In the Alternative To Avoid Stipulation," supported by his affidavit and various other exhibits (R 21-57). The facts thus presented were unopposed by counter-affidavit, or evidence of any kind.

Petitioner's first knowledge of this stipulation was on August 22, 1966. He immediately telephoned Louis J. Perona, the attorney who had executed the stipulation, to say that he did not agree, and could not agree, to a second lien in favor of respondent (R 25). Mr. Perona conceded that he had acted without authority (R 24, 25). Perona then prepared a proposed motion to amend stipulation, which recited his lack of authority to execute a stipulation providing for a second lien on behalf of respondent (R 45).

Petitioner's motion was denied, by the supplementary decree of August 31, 1966 (R 61), which also found with no evidentiary foundation that "Perona and Perona, attorneys for the defendant . . . were and are authorized to enter into said stipulation . . ." (R 62, App. 16).

The decree (App. 15, 16) departed from the stipulation by allowing respondent to retain her undivided half interest in the realty until such time as all obligations to her had been discharged by petitioner; the stipulation by its terms required her to convey that half interest to petitioner immediately. In this way the judge recognized petitioner's inability to subject the property to a second lien in favor of respondent. In all other material respects, the supplementary decree followed and was based solely upon the unauthorized stipulation.

Within a relatively short time, successive measures by petitioner for relief, were swiftly met by respondent with counter-measures, through which heavier burdens were successfully imposed upon respondent, as follows:

1. New counsel for petitioner on September 6, 1966 renewed petitioner's objection to the unauthorized stipulation and the decree based upon it (R 65-66). Two days later respondent filed a petition to adjudicate petitioner in willful contempt for failure to pay the $4900.00 due under the decree assailed, and for $500.00 attorney's fees for services rendered after the decree (R 69-70). This petition was granted[3] on September 15, when the trial judge also overruled petitioner's renewed objection (R 90-91, App. 18, 19).

2. On September 15, petitioner filed notice of appeal (R 92) and on the following day, a supersedeas bond (R 97-103).

Three days later respondent petitioned for equitable alimony and additional attorneys fees for services to be rendered pending appeal. The trial judge awarded her $70.00 per week as alimony, and $1,750.00 attorney's fees, on September 26, 1966.[4]

The alimony award was made independently of, and without regard to the decree of August 31, 1963, which had awarded respondent $5000.00 in alimony (along with a property settlement) as a complete bar to all alimony claims; no provision was made for crediting the $70.00 per

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[3]On two later occasions, respondent was also adjudicated as being in willful contempt, as aftermaths of the supplemental decree of August 31, 1966, based on the unauthorized stipulation (R 204, App. 22, R 282, 283, App. 28, 29).

[4]The $50.00 per week temporary alimony had been awarded earlier in the case after the taking of testimony. The hearing at which equitable alimony was awarded included the taking of testimony concerning the fees, and very meager testimony concerning the alimony award. The latter testimony did not deal with petitioner's financial condition, being confined only to respondent's needs, and showed no significant change in those needs from the time of the temporary award. (R 413)

week equitable alimony upon the $5,000.00 lump sum award.

3. Petitioner on September 20, 1966, filed his praecipe for the record on appeal, designating a complete transcript of the record and all testimony. Three days later, respondent filed objections to the praecipe as to those matters which preceded August 31, 1966 (R 138). The trial judge, on September 29, 1966, sustained the objections and the clerk obeyed that order,[5] in certifying only a partial record to the Appellate Court.

The Appellate Court in its opinion misstated the record, in saying with regard to the unauthorized stipulation (AR 17, App. 8): "The parties admit that it was signed properly by attorneys for both parties. . . ."

There was no such admission by the petitioner. Consistently and persistently in the Appellate Court, petitioner contended that there was no real stipulation between the parties, because the signing of it on his behalf was unauthorized by him[6] (Appellant's Principal Brief, p. 3, 1 issue 15; p. 4 (proposition II); p. 11, 1st par.; p. 13, part II; Appellant Reply Brief, pp. 7, 8, part II).

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[5]The order was entered by the trial judge in his own hand, on the Henry County Circuit Court Chancery Docket, maintained as the official and public record of docket entries in the court. (R 156, 413, App. 30). No other order, draft or otherwise, was entered sustaining objections to the praecipe. The rules of the Circuit Court of Henry County provide for the prevailing party to prepare and have entered a more formal draft order. (App. 2).

[6]Respondent's presentation in the Appellate Court, as well as petitioner's, recognized that by changing the words in the stipulation from "second mortgage" to "second lien" there had been a change in meaning. Thus in respondent's brief (p. 14) she stated that "a 'second mortgage' would be a third lien on the real estate subject to the judgment, while the court (below) construed the stipulation as filed

The Appellate Court declined to review the order sustaining objections to petitioner's designation of the contents of the record on appeal. Referring to the final divorce decree of June 13, 1963, the Appellate Court ruled (AR 19, App. 7, 8):

> "Since we have determined that the June 13, 1966, decree was not appealed from, there was no occasion to have a review of the record prior to August 31, 1966. It is, therefore, unnecessary to determine whether or not defendant was inhibited or prevented from bringing that portion of the record to this Court on appeal. Such exclusion could not have been error under the record before us."

The Appellate Court did not decide whether such exclusion would have been error under a record which included the omitted matter.

With respect to the September 23 order relating to equitable alimony and attorney's fees the Appellate Court further ruled, "The record before us is such that there is no showing made in this court that the trial court abused its discretion. . . ."

In its ruling and decision concerning the equitable alimony order of September 23, Appellate Court necessarily made no ruling as to the propriety of that order, in the light of portions of the trial court record designated by petitioner, but omitted from the record or review (AR 20, App. 10).

The Appellate Court accordingly dismissed the appeal, its opinion reciting that "the decree of August 31, 1966, as

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(with the words 'second lien', rather than 'second mortgage') to require a second lien for security." The Appellate Court's opinion treats those two phrases as if having been given the same meaning by the trial court (AR 18, App. 8). Thus in its treatment of the stipulation, the Appellate Court decided a non-existent issue, and failed to decide the real issue, which was concealed by the opinion's misstatement concerning the agreement of the parties.

well as the orders of September 15, 1966 and September 23, 1966, are affirmed." (AR 20, App. 10).

Petitioner thereafter filed in the Supreme Court of Illinois, his petition for appeal as a matter of right, asking that court to exercise its discretion to review the decision of the Appellate Court. That petition described the decision (S.Ct.R. 1, p. 2) as "having given rise to questions under the 14th Amendment to the Constitution of the United States. . ."

That petition further stated (p. 5):

> "In each instance, the Appellate Court's dismissal of certain appeals and the affirmance of certain orders violates this defendant's and all future appellants' Constitutionally protected rights, as follows: . . . The Constitutional right to the protection of due process of law (Amend. 14, Const. of U.S.; . . .)"

The petition refers to the decree of August 31, 1966 as one of several "gross transgressions against defendant's fundamental and organic protection to liberty and property . . ." (p. 10) and charges that "the order which excluded portions of the appellate record in effect precluded a full appellate review . . ." (pp. 16, 17).

Summarizing with respect to the decree based on the unauthorized stipulation, the petition stated (p. 25):

> "The entry of the 8-31-66 decree was a whole-cloth denial of defendant's right to a hearing 'under the general rules which govern society.' Regardless of the Appellate Court's determination to equate that order as a 'stipulated' order; the undisputed facts are to the contrary."
>
> * * *
>
> "Therefore, the Appellate Court, by its affirmance of the August 31, 1966 decree, as a stipulated order, has denied defendant his right to substantive and procedural due process of law under both federal and state constitutions."

The petition for leave to appeal, in its invocation of constitutional rights, was summarized by respondent in her answer to that petition where she stated (p. 18):

> "Defendant seeks review here as a matter of right, claiming that the decision of the Appellate Court affirming the property decree of August 31 and the orders of September 15 and September 23, and dismissing the appeal from the divorce decree of June 13, violated his rights under the Illinois and U.S. Constitutions."

ARGUMENT

Petitioner in this argument presents reasons for granting the writ.

I.

The Constitutional Questions Were Timely and Properly Raised, So As To Give This Court Jurisdiction.

Petitioner's first opportunity to raise the constitutional questions arose in, and as a result of the action of the Appellate Court.

Review by the Appellate Court of proceedings in the Circuit Court of Henry County is a matter of right, Constitution of the State of Illinois, Art. 6, Sec. 7, and in substance and by Illinois Law "a continuation of the proceedings in the trial court" Ch. 110, Ill. Rev. Stat. (1965 ed.) 74. Due process of law as for example, through full and fair hearing, is not required before judgment. Due process is not denied in violation of a constitutional right, when there exists adequate opportunity to obtain it by appeal *American Surety Co. v. Baldwin*, 287 U.S. 156, (1932); *Moore Ice Cream Co. v. Rose*, 289 U.S. 377, 384 (1932). It follows that raising the constitutional questions prior to the time the Appellate Court rendered its decision would have been premature.

Following rendition of the decision of the Appellate Court, petitioner raised the constitutional questions by his Petition For Leave to Appeal as A Matter of Right, filed in the Illinois Supreme Court, and there denied. This was peitioner's first opportunity to raise those questions, and he exercised it. His action in that regard was therefore timely. *Brinkerhoff–Faris Trust Co. v. Hill*, 281 U.S. 673, 677-8; *Great Northern R.R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 366-7 (1932); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320.

II.

The Decree of August 31, 1966, Disposing Of Jointly Held Property and Requiring Petitioner To Pay His Former Wife the Sum Of $20,500.00, Was Entered In Violation of Petitioner's Constitutional Right To Due Process of Law.

The sole basis for the entry of this decree was the stipulation executed by petitioner's attorney, but without authority from petitioner. The lack of such authority was made abundantly clear to the trial court, by prompt and formal action of petitioner, prior to the entry of this decree.

It is settled law in Illinois and elsewhere, that an attorney by the fact of his representation of the client, has no implied authority to settle the case in which he appears for the client. *Weatherbee v. Fitch*, 117 Ill. 67, 75 (1886); *McClintoch v. Helberg*, (S.Ct.Ill.), 48 N.E. 145 (1897); *Danziger v. Pittsfield Shoe Co.*, (S.Ct.Ill.) 68 N.E. 534 (1903); *U.S. v. Beebe*, 180 U.S. 343, 351-2 (1901); 66 A.L.R. 102, 107, 108.

A party has a fundamental right, guaranteed by the due process clause of the Federal Constitution, that a decree against him have some basis, in reason and fairness for its entry, such as evidence taken at fair hearing or consent. He must have an opportunity to be heard on contested issues

through the reception of evidence. *Iron Cliffs Co. v. Negaunee*, 197 U.S. 463. The unauthorized stipulation was used to deny petitioner that constitutional right.

III.

The Constitutional Guarantee To Due Process Extends to Proceedings In the Appellate Court.

The right of review by the Appellate Court was an integral part of petitioner's right to due process of law. As such, it falls within the protection given by the 14th Amendment to the Constitution. *Griffin v. Illinois*, 351 U.S. 12; *Frank v. Mangum*, 237 U.S. 300, 327 (1915); *Cole v. Arkansas*, 333 U.S. 196, 201, 202 (1947).

IV.

The Order of September 26, 1966 Awarding Respondent Equitable Alimony Infringed Petitioner's Constitutional Rights To Due Process of Law.

The decree of August 31, 1966, and the stipulation on which it was based, awarded respondent certain property then jointly owned by the parties, and in addition, a lump sum of $20,500.00, payable by petitioner, of which $5000.00 was alimony, awarded her in full settlement of all claims to alimony.

Shortly after petitioner filed his notice of appeal, respondent petitioned for additional alimony pending appeal. The trial court awarded her such additional alimony (plus $1,750.00 attorneys fees for services to be rendered on the appeal). That order literally and directly made the obligation to pay the alimony decreed, a burden upon petitioner in addition to the burden imposed upon him by the decree of August 31, 1966, which was a complete discharge and bar to all future alimony claims. No provision was made for credit of the equitable alimony pending appeal, upon the alimony previously decreed.

In this respect, the award of equitable alimony was plainly a penalty upon petitioner for taking an appeal to obtain the due process of law up to that point of time denied him in the trial court.

To penalize a person for the exercise of a constitutional right is to infringe or to deny that constitutional right and is a denial of due process of law, *Holt v. Virginia*, 381 U.S. 131 (1965).

V.

The Exclusion From The Record On Appeal Of The Trial Court Record Designated By Petitioner, Denied Petitioner Due Process of of Law In Presentation Of His Appeal.

It was petitioner's right to present his case on appeal as he saw fit, rather than as the trial court under review saw fit. This right was provided by state court practice; Illinois Supreme Court Rule 36, provided that the appellant in appeals to an Appellate Court "shall designate what parts of the trial court record are to be incorporated in the record on appeal." It further provides that "all parts of the record so designated shall be incorporated in the record on appeal . . ." The sanction for designation of an excessive record is the taxation of costs against the offending party. Ch. 110 Ill. Rev. Stat. (1965) Sec. 101.36.

The court under review is neither a safe nor proper authority to determine the needs of a party appealing from it, for the record to be employed in the presentation of his case. "It is certainly doubtful that any trial court has the authority to so limit the appellate record or to exclude anything therefrom which shows happenings which actually took place in the court and which an appellant decides to present to an appellate court." (*Pritchard v. Nelson*, 55 F. Supp. 506, 517 W.D.Va. 1943, aff'd 137 F.2d 312 (C.A. 4, 1943)). Accordingly, it is general if not universal appellate procedure to allow the parties to an appeal to determine what shall go into the record on review by the appellate tribunal, without obstruction by the trial court.

The federal practice in this regard is in all essential respects identical with the procedure in Illinois. Rules 75(a), (g) FRCP. Prior to abrogation effective July 1, 1968; Rules 8(b) and (c) Federal Rules of Appellate Procedure. Efforts by federal judges, under the federal practice, to control the contents of the record on appeal from their judgments, have been universally condemned. *Treasure Imports Inc. v. Henry Amjur & Sons*, 127 F.2d 3, 5 (C.A. 2, 1942); following a prior decision by the same court, *United States v. Forness*, 125 F.2d 928; *William Howard Hay Foundation v. Safety Harbor Sanatorium Inc.*, 141 F.2d 952 (C.A. 5, 1944); and *Belt v. Holton*, 197 F.2d 579 (C.A. D.C. 1952).

In *Clawans v. White*, 112 F.2d 189 (C.A. D.C.), the court through Justice Rutledge gave extensive consideration to the problem of determining the contents of the record on appeal, including a discussion of "judicial fraud, that is, deliberate and intentional falsification by the trial justice of the record on appeal. . . ." (p. 191). It then proceeded to refer to the serious character of a charge of such falsification, and defined it in the following statement:

> "Intentional and deliberate falsification includes deliberate refusal to certify a true record as well as actual certification of a false one."

Whether or not the foregoing is applicable here, it is self-evident that obstruction of the right of petitioner to present his case on appeal, to obtain there the fair hearing, up to that point of time denied him, is an infringement of his constitutional rights to due process of law. Authority is in accord. *Griffin v. Illinois*, 351 U.S. 12 and *Frank v. Mangum*, 237 U.S. 300, 327 (1915). See also *Cochran v. Kansas*, 316 U.S. 255 (1941) and *Dowd v. Cook*, 340 U.S. 206 (1950).

VI.

The Decision of the Appellate Court Is No Answer To The Demands Of Petitioner For Due Process As a Matter of Right.

In its opinion, the Appellate Court stated that proceedings preceded the divorce decree does not confine their relevance to that decree, either in fact, or in logic.

This is a non-sequitur. The circumstance that the proceedings preceded the divorce decree does not confine relevance to that decree, either in fact, or in logic.

Meager as is the record of the trial court proceedings prior to the divorce decree, it nonetheless presents illustration of this point. Evidence was taken at the hearing on temporary alimony, occurring December 13, 1965; the record does not disclose what the evidence was—only the fact that it was received. Such evidence would of course be pertinent to the determination of the equitable alimony awarded pending appeal.

In *Sanders v. Shaw*, 244 U.S. 317, evidence was excluded as legally irrelevant upon objections by the defendant. It was spread of record to enable the reviewing court to review the ruling. The court did so; held the evidence admissible; and instead of remanding to permit the defendant to offer opposing evidence, reversed and granted judgment for the plaintiff. Thus the defendant was maneuvered out of the opportunity to have his evidence considered. The Supreme Court held this a violation of the due process clause of the 14th Amendment. So also, exclusion of the evidence at the hearing on temporary alimony from consideration by the Appellate Court denied petitioner's due process there.

VII.

Review By This Court of The Decision By The Appellate Court Is a Matter of Wide-Spread Public Importance.

The record of the trial court proceedings, prepared and filed in the Appellate Court for its use on review, is also potentially the record to be filed in this Court, in review of the Appellate Court, or of the Illinois Supreme Court on its review of the Appellate Court judgment. The same is true in all cases originating in state courts. In every case, the adequacy of the record in the reviewing courts is of potential concern to this court.

The questions presented by this case may well arise in every case appealed in the state of Illinois. Because of the uniformity of appellate procedure throughout all states, and the Federal Judicial System as well, these questions are inherently present in all or nearly all appellate proceedings throughout the nation.

The decision of the Appellate Court of Illinois circumscribes and to a substantial degree if not totally, nullifies the right of an appealing party to a full and fair hearing on appeal, by imposing upon him an impossible burden as a condition of vindication of that right. According to that decision, he must show, the record to be incomplete, show that he has suffered injury, by the very record which is incomplete, rather than by examination of the improperly omitted portion of the record. This condition frequently if not normally will be impossible of fulfillment.

Reversal of the Appellate Court is a matter of immediate importance far beyond the particular facts, and the parties to this particular case. A tremendously important principle is at stake—the right of a party to present at the appellate level, and on a true record,

his own case,

his own way,

unimpeded by the trial court under review.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Frank J. Delany
Ray E. Dougherty
Counsel for petitioner

APPENDIX A

ILLINOIS SUPREME COURT RULE 36, TITLE 110, SMITH-HURD ILLINOIS ANNOTATED STATUTES, SECTION 101.36 (Prior to revision effective January 1, 1967)

101.36 (Supreme Court Rule 36). The Record on Appeal.

(1) Praecipe for Record; Report of Proceedings at the Trial.

(a) Praecipe practice. In Appeals taken directly to an Appellate Court or this court, the appellant shall, within 10 days after the notice of appeal has been filed, prepare and file a praecipe with the clerk of the trial court, with proof of service of a copy on the appellee or his attorney, in which appellant shall designate what parts of the trial court record are to be incorporated in the record on appeal. The appellee, or co-party prosecuting a separate appeal, shall within 5 days after being so served, file a praecipe for any additional parts of the record that he may desire to have incorporated in the record on appeal, with proof of service of a copy upon each party or attorney or firm of attorneys who signed the notice of appeal.

(b) Copies in record on appeal; . . .

All parts of the record so designated shall be incorporated in the record on appeal by copies certified by the clerk . . . .

* * * * *

(3) . . . Unnecessary Matter Included in Record on Appeal.

* * * * *

Any party who has specified for incorporation in the record on appeal unnecessary and immaterial portions of the trial court record may be ordered by the reviewing court, irrespective of how the appeal is decided, to bear the entire expense of incorporating those portions, as costs in the case.

APPENDIX B

Rule 7. Uniform Rules of the Circuit Court of Illinois as Adopted by the 14th Judicial Circuit for Henry County, Title 110, Illinois Revised Statutes, Section 307.1 (1965 ed.).

307.1 (Circuit Court Rule 7.1). Presentation of Drafts.

When the court rules upon a motion other than in the course of trial or makes a final determination in an action, the attorney for the prevailing party shall prepare and present to the court the order, judgment, or decree to be entered, unless the judge directs otherwise.

APPENDIX C

66-101

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1968.

BETTY DOLAR KAZUBOWSKI,
Plaintiff-Appellee,

v.

EDWARD J. KAZUBOWSKI,
Defendant-Appellant.

Appeal from the Circuit Court of Henry County, Illinois. Honorable Dan H. McNeal, Presiding Judge.

PER CURIAM

The nature of the appeal and the proceedings in this Court can best be understood by a recital of what apparently transpired in the trial court.

The proceeding arose as an action for divorce by Betty Dolar Kazubowski as against appellant, Edward J. Kazubowski. As a result of a jury trial, the issues on the complaint of plaintiff were found in favor of plaintiff and against defendant (and as against defendant on defendant's counterclaim). By reason thereof, a decree for divorce was entered on June 13, 1966. There were no children of the parties and no custody problems are involved.

The decree contained a recital that there was "no reason for delaying enforcement or appeal of this portion of the order" as an attempt to comply with Section 50(2) of the Civil Practice Act [1965 Illinois Revised Statutes, Ch. 110 § 50(2)]. The decree made no adjustment of property rights but such matters were reserved by the court for later determination. On July 12, 1966, a post-trial motion was heard with respect to the decree of June 13, 1966, and such motion was denied.

Thereafter, on July 25, 1966, a four-page stipulation was entered into by attorneys for each of the parties presumably settling all property rights. Among other things the stipulation provided for a $15,500 payment by the defendant (the husband) to the plaintiff and such payment was to be secured by a "second mortgage" on property which was owned jointly. To carry this into effect, the interest of the plaintiff was to be conveyed by plaintiff to defendant. The property was owned in joint tenancy during the marriage and there was a first mortgage on it. However, since the divorce action had been instituted, a judgment had been entered as against defendant by confession in the sum of $10,000, in favor of the mother of defendant, Mary Kazubowski. Since a second mortgage would amount, under such conditions, to a third lien, the court decree which was entered later in August, which adopted the stipulation, provided that defendant should secure his payment of $15,500 with a "second lien". The decree further provided that plaintiff (wife) could retain her joint interest in the property until she was given a "second lien" on the property.

It is this provision in the stipulation and the action of the court in the decree which appears to be the basis of the problems which arise in this cause. The defendant had filed a motion to amend the stipulation prior to the time the decree was actually entered pursuant to such stipulation.

On July 27, 1966, defendant filed a motion for continuance requesting that no hearing be held on the property division until the divorce decree became final by failure of defendant to file notice of appeal within 30 days after the denial of the post-trial motion which was on July 12, 1966. This motion apparently gave recognition to the recital contained in the decree that there was no reason for delaying enforcement or appeal of the portion of the order decreeing that a divorce was granted.

On August 31, 1966, the court entered the proper settlement decree which contained the "second lien" provision hereinabove referred to. The decree was presumably entered pursuant to stipulation of the parties and following appearance of attorneys for the parties in court. At the same time, the court denied defendant's motion to modify the stipulation and the decree, and the property settlement decree was entered. Thereafter, on September 6, 1966, defendant filed objections to the decree on the ground that the court had incorrectly modified the stipulation between the parties. On September 8, 1966, plaintiff filed a petition requesting that defendant be cited for contempt and be ordered to pay attorney's fees. On September 15, 1966, defendant filed amended objections and motion to vacate the decree and an answer to the petition filed by plaintiff.

On September 15, 1966, defendant filed a notice of appeal from the decree of August 31, 1966, covering property settlement in this cause. On this same date, September 15, 1966, a hearing was held with respect to plaintiff's relief requested. The only testimony offered at such time was that of plaintiff's attorney. On cross-examination he was asked about the negotiations with respect to the stipulation and he stated unequivocally that he refused to take anything

less than a second lien as security against defendant's obligation to pay the $15,000. The court entered an order overruling defendant's objections; allowing citations for contempt; finding defendant in contempt for failure to pay $4,900 on September 1, 1966; allowing $500 attorney's fees for plaintiff's counsel; holding defendant in willful contempt; and directing the clerk to issue a mittimus committing defendant to jail for six months or until he sooner purges himself by payment of $5,400.

On September 19, 1966, plaintiff filed a petition for alimony during the period of appeal and for attorney's fees to pay for the appeal. Defendant filed a special and limited appearance to this motion. On September 23, 1966, a hearing was held in regard to the relief requested on the petition of September 19 referred to and the court awarded $70 a week as alimony and $1,700 as attorney's fees to plaintiff to be paid by defendant. On September 28, 1966, plaintiff filed a petition for a rule to show cause why the September 23, 1966, order was not complied with. Defendant replied to such petition and on September 29, 1966, asked that the September 23 order be included in the appeal. The court allowed this but ordered that the June 13, 1966, decree (the original divorce decree) was not to be part of the appeal. Thereafter, in October and November there were a series of petitions and orders dealing with enforcement of the decree by contempt and also allowing defendant to include these various later orders in the appeal.

On appeal in this Court, defendant contends that it was reversible error to exclude matters prior to July 12, 1966, from the record on appeal. This is based on the contention asserted that the decree for a divorce only is not enforceable nor final and appealable. The June 13, 1966, divorce decree, if appealable, would become final 30 days after July 12, 1966, the date upon which the post-trial motion was denied. There was no appeal from such decree during such period. Chapter 110 § 50(a) (1965 Illinois Revised Statutes) of the Civil Practice Act provides:

> "If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or rights and liabilities of few than all of the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before entry of the order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."

The question before us is whether this section operates to make the June 13 decree a decree which was not final or appealable.

It is the contention of the defendant that the June 13, 1966 decree could not be construed as a final and appealable order even if there was the finding referred to in Section 50(2) on the basis of *Biagi v. O'Connor*, 18 Ill.2d 238 and *Davis v. Childers*, 33 Ill.2d 297. In the *Biagi* case (which involved a partnership accounting) a decree was entered dismissing a counter-complaint and referring the matter to a Master. It involved a decree entered in June, 1954, before Section 50(2) was passed. A later decree was entered in July, 1956. The Appellate Court, in construing the section stated that it was procedural and applied it retroactively. The basic question in the *Biagi* case was that of constitutionality of such retroactive application and is not a precedent for construction of the issue before us.

In *Davis v. Childers*, supra, there was a trial before a jury in an automobile accident case. The jury found for the defendant but the trial judge entered a judgment notwithstanding the verdict for plaintiff and in that judgment provided there was no reason for delaying the appeal. The question of damages was reserved for determination. The appeal was dismissed in the Appellate Court and this action was affirmed

in the Supreme Court on the ground that Section 50(2) could not apply even if the judge provided that there could be an immediate appeal. The court there found that there was only a single claim and a single party involved. This tort action is not a precedent to be applied in a divorce action where there is both a termination of the marriage, and an independent, supplementary claim for property settlement even though the relief as to both is sought in one complaint. They are in fact separate claims.

In *McGee v. McGee*, 36 Ill.App.2d 105, a complaint for divorce on the ground of drunkenness was heard without a jury and a decree was entered awarding plaintiff a divorce. The divorce decree simply ordered that the question of property settlement, alimony and attorney's fees are reserved for future consideration of the court. There was no express finding under Section 50(2) that there was no just reason in delaying the appeal, but, on the contrary, the court expressly found that there were still rights to be adjudicated between the parties and which were expressly reserved for future consideration. The court stated that in absence of an express finding required by Section 50(2), the decree adjudicated fewer than all of the matters in controversy between the parties and was not appealable. The court expressly stated (at Page 107):

> "Thus, multiple claims for relief were involved in plaintiff's action. Under such circumstances section 50(2) of the Civil Practice Act provides that the court may enter a *final* decree as to fewer than all of such claims only upon an express finding that there is no just reason for delaying appeal, and that in the absence of that finding, any decree which adjudicates fewer than all of such claims is not appealable."

The court in *Ariola v. Nigro*, 13 Ill.2d 200, in interpreting Section 50(2), also pointed out that no specific finding under Section 50(2) was made in that case and consequently a court determination was not appealable. Since on the basis of the record, there was such specific finding in the

cause before us in compliance with Section 50(2), the decree for divorce was final and appealable. In view of the fact that there was no appeal from such decree, that decree could not be reviewed on this appeal.

The next issue for consideration was whether the decree of August 31, 1966, was proper. In this connection the first question for review is whether the stipulation by attorneys for both parties signed July 25, 1966, was a proper stipulation and a true agreement of the parties and not invalid because of fraud. The parties admit that it was signed properly by attorneys for both parties at the time. Such stipulation in absence of a showing of fraud is binding upon the parties. A stipulation is an agreement between the parties or their attorneys with respect to business before the court and the courts look with favor on stipulations designed to simplify, shorten or settle litigation and save costs to the parties (34 I.L.P. 166). It is obvious that one of the parties to a stipulation cannot withdraw from the binding force of such stipulation unless he has the consent of the other party or leave of the court (*Vidon v. Roberts*, 330 Ill.App. 104).

Stipulations between parties are enforced by the courts unless there is a showing that the stipulation is a result of fraud, or is unreasonable or contrary to public morals (*People v. Spring Lake District*, 253 Ill. 479). In the case before us there was no contention by defendant of any fraud. In fact, the only apparent objection that defendant had to the stipulation appears to be in the variation from the language in the stipulation which referred to a "second mortgage" to a wording of "second lien" in the decree, as an interpretation of what the court felt the parties really intended. It is obvious that stipulations must be construed by the courts when they are enforced as part of a proceeding before the court. In construing a stipulation, the court will look to the actual intention of the parties (*General Electric Co. v. Industrial Commission*, 411 Ill. 401; *Lake Shore & Michigan Southern Railway Company v. Hessions*, 150 Ill. 546). The interpretation of the trial court that what the parties

intended was a mortgage or lien second only to an existing first mortgage was reasonable in light of the facts and record before us. Nothing is shown on appeal in this Court to indicate that this interpretation was erroneous or unsound, nor was any question of fraud raised with respect to this stipulation. We, therefore, conclude that defendant cannot now claim that he is not bound by the stipulation and the interpretation thereof by the trial court. Since the stipulation entered into by attorneys was valid and the decree was proper under the record, we find no basis for setting aside or modifying such decree.

It is also contended in this Court that the refusal of the trial judge to permit the entire record to be included in the appeal was reversible error. Defendant filed a praecipe for the entire record to which plaintiff objected with respect to the inclusion of any proceedings prior to August 31, 1966. A docket entry was made sustaining objections to the praecipe (although plaintiff contends that since the clerk had not entered the order on the objections, defendant could still have brought up the entire record on appeal). Since we have determined that the June 13, 1966, decree was not appealed from, there was no accasion to have a review of the record prior to August 31, 1966. It is, therefore, unnecessary to determine whether or not defendant was inhibited or prevented from bringing that portion of the record to this Court on appeal. Such exclusion could not have been error under the record before us.

The next fundamental question before us is whether the September 15, 1966, order of contempt could be enforced as against defendant within the 30 day period after it was entered. Defendant contends that decrees do not become final and enforceable for a period of 30 days after they are entered. Defendant could have prevented the enforcement of such decree by a proper appeal under Section 82 of the Civil Practice Act (1965 Illinois Revised Statutes, Ch. 110 § 82) and the filing of bond. The appeal would then operate as a supersedeas. This was not done before the enforce-

ment proceeding on September 15, 1966. Accordingly, the contempt order was valid. Decrees are valid when entered (*Horn v. Horn*, 234 Ill. 268). Defendant had an opportunity to suspend the enforcement of the August 31, 1966 decree by institution of an immediate appeal. Under the facts as appear before us, however, the September 15, 1966 contempt order was valid.

Defendant filed his notice of appeal in this case on September 15, 1966. He then attempted on several occasions to amend the notice of appeal to include a number of later orders including the order of September 23 relating to temporary alimony and attorney's fees. While, under the record, it is uncertain whether the appeal has been perfected as to this order (1965 Illinois Revised Statutes, Ch. 110 §101.33) we believe that the record before us is such that there is no showing made in this Court that the trial court abused its discretion in entering the order of September 23, 1966. Under the standards reviewed in *Micelli v. Micelli*, 45 Ill.App.2d 159, 195 N.E.2d 233, we feel that no showing is made on appeal that such order was not within the sound discretion of the court.

The appeal of appellant, Edward J. Kazubowski, with respect to the decree for divorce is accordingly dismissed and the decree of August 31, 1966, as well as the orders of September 15, 1966, and September 23, 1966, are affirmed.

Certain appeals dismissed and certain decree and orders affirmed.

APPENDIX D

[Filed Aug. 31, 1966]

In The
CIRCUIT COURT OF HENRY COUNTY
14th JUDICIAL DISTRICT
General Division

STATE OF ILLINOIS } SS
COUNTY OF HENRY }

BETTY DOLAR KAZUBOWSKI,
Plaintiff,
v.
EDWARD J. KAZUBOWSKI,
Defendant.
} No. 65-D-1240

DECREE

Now this cause comes on to be heard on the amended complaint of the plaintiff and the answer thereto of the defendant and upon the stipulation entered in this cause on August 15, 1966 and upon the motion to amend and modify the stipulation, and the plaintiff being personally present in open court and by her attorney, Gregg A. Young, and the defendant being personally present in open court and by his attorneys, Perona and Perona, and the court having heard the evidence and arguments of counsel and the stipulation executed by the respective attorneys filed herein, and being fully advised in the premises finds that it has jurisdiction of the parties hereto and of the subject matter in this cause and finds that previous hereto a decree of divorce was entered in this cause whereby the plaintiff was granted a divorce from the defendant as provided by law;

And now the court considers said stipulation filed in this cause on August 15, 1966 in words and figures as follows:

"It is stipulated and agreed by and between the parties hereto as follows:

1. That the defendant and counterplaintiff shall pay to the plaintiff and counterdefendant the total amount of $20,500.00 less the amount, if any, which said defendant and counterplaintiff has paid to said plaintiff and counterdefendant as temporary alimony since July 25, 1966. The defendant and counterplaintiff shall also deliver to the plaintiff and counterdefendant as her sole property 50 shares of common stock of the Illinois Power Company, a corporation, and 20 shares of common stock of General Telephone Company, a corporation, and the securities owned by the parties hereto in Blackhawk, Inc., a corporation. That it is agreed that said common stock and securities at the time of making of this agreement between the parties has a value of $3,570.00. That said sum of $20,500.00 is to be paid as follows: $5,000.00 cash on or before September 1, 1966, provided that said $5,000.00 shall be reduced by the amount of $100.00 paid as temporary alimony since July 25, 1966. The balance remaining or $15,500.00 shall be paid in four equal installments each in the amount of $3,875.00 payable the first day of September in 1967, 1968, 1969 and 1970. Said payments of $3,875.00 shall bear no interest and shall be evidenced by trust deed notes payable to the plaintiff and counterdefendant and secured by a trust deed to Louis J. Perona, Trustee, on the real estate now owned by the parties located in Kewanee, Illinois, which shall constitute a second lien.

2. That on or before September 1, 1966, the plaintiff and counterdefendant shall deliver to the defendant and counterplaintiff all of the gold coins which were owned by the parties, the gold for dental bridge work which was removed by the plaintiff and counterdefendant from the dental

office of the defendant and counterplaintiff and the travel alarm clock owned by the defendant all of which items shall thereafter be the sole property of the defendant and counterplaintiff.

3. That on or before September 1, 1966, the plaintiff and counterdefendant shall cause to be picked up from the home of the parties in Kewanee, Illinois, the following items of personal property which thereafter shall be solely owned by her but she shall not enter said home: twin beds, mattresses and springs, bed side table and mirror and chair, which are part of the same bedroom set and the vanity dresser which in appearance is similar to a kneehole desk; all hand painted dishes and hand painted mug; silver plated butter dish and coffee pot and the silver items which are included in a suitcase in the basement of the home; cut glass vase and relish dish and cut glass items in boxes in basement of said home; brown coffee pot, teflon fry pan and aluminum roaster; one blue and white table cloth with six matching napkins; knife sharpener and hand mixer and one of the electric fry pans; book called "Lincoln's Library Essential Information"; cookbooks and recipes; catholic medal located in the automobile.

4. That the plaintiff and counterdefendant shall execute and deliver to the defendant and counterplaintiff a quitclaim deed conveying all of her interest in the real estate jointly owned by the parties hereto and shall execute an assignment of the automobile title for the automobile in the possession of the defendant and counterplaintiff if her name is included on the title to said automobile. That all other items of personal property not mentioned herein including said automobile and including all personal property located in the home and place of business of the defendant and counterplaintiff located in Kewanee, Illinois, shall be and remain the sole property of the defendant and counterplaintiff. That all bank accounts, savings and loan accounts,

and all monies of any kind and insurance policies owned by the parties shall be and remain the sole property of the defendant and counterplaintiff and the plaintiff and counterdefendant shall execute any documents necessary to convey and assign to said defendant and counterplaintiff any interest which she may have in any of said items.

5. Five Thousand Dollars of the total amount agreed to be paid to the plaintiff and counterdefendant shall constitute periodic payments of alimony and shall be in lieu of and in full satisfaction of all rights to alimony which the plaintiff and counterdefendant may have. Said $5,000.00 of alimony shall be paid in periodic payments of $1,250.00 on September 1st of 1967, 1968, 1969 and 1970 and shall be included within the total payment of $3,875.00 to be made on said dates as provided for herein. Said alimony payments shall be conditioned so that any future alimony payments will be terminated in the event of the death or remarriage of the plaintiff and counterdefendant. The trust-deed notes evidencing said payments of $3,875.00 shall contain therein a statement that $1,250.00 of said sum shall not be payable in the event of the death or remarriage of the plaintiff and counterdefendant prior to the due date thereof. That following the exchanges of property provided for herein, the plaintiff and counterdefendant shall have no right or interest of any kind either in dower, homestead or of any other kind in the property of the defendant and counterplaintiff and the defendant and counterplaintiff shall have no similar interest in the property of the plaintiff and counterdefendant.

6. That each of the parties hereto shall pay his or her own attorney fees. That the plaintiff and counterdefendant shall pay and be solely responsible for all debts and obligations incurred by her since November 20, 1965 and the defendant and counterplaintiff shall have no liability for same. That the defendant and counterplaintiff shall be solely respon-

sible for the debts and obligations incurred by him since November 20, 1965, and the plaintiff and counterdefendant shall have no liability for same. That the unpaid court costs in this proceeding shall be paid by the defendant and counterplaintiff.

And now the court examines said stipulation and finds that by inadvertence, the stipulation included only the hand painted dishes, but that the letter of July 27, 1966 from Perona and Perona addressed to Gregg A. Young, attorney for plaintiff states that, "She may have all of the dishes which she owned including all of the hand painted dishes," and that said provision should be included in said stipulation;

And the court also finds that the motion of the defendant, Edward J. Kazubowski, to modify the stipulation should be and the same is hereby denied, and on consideration thereof, the stipulation of August 15, 1966 should be and the same is hereby approved and confirmed.

It is hereby ordered, adjudged and decreed that the terms thereof be carried out by the respective parties except,

It is ordered, adjudged and decreed that in the event that defendant, Edward J. Kazubowski, is unable to give to said plaintiff the security of a second lien upon the premises described as;

Lot Number Three of Houle's Subdivision of Lot Number Seven of the Town of Wethersfield according to the Colony Plat thereof in the City of Kewanee, County of Henry and State of Illinois,

because of the intervention of a judgment of one Mary Kazubowski against said Edward J. Kazubowski or for any other reason then;

It is ordered, adjudged and decreed that the plaintiff, Betty Dolar Kazubowski, shall have and retain title to the above described premises and all her interest therein to have and to hold as security only for the payment and to secure the payment of the sum or sums of money due under the

terms of said stipulation, and upon full compliance with the payment of the sums of money stipulated to be paid, that then said Betty Dolar Kazubowski, the plaintiff, shall convey said premises by quitclaim deed to the defendant, and

It is further ordered, adjudged and decreed that except as herein set forth in the matter of the dishes owned by said plaintiff and in the matter of the security arrangements provided in the stipulation, the said stipulation is hereby adopted and confirmed as a decree of this court to be carried out by the parties in precise accordance with the terms thereof; and the court determines that Perona and Perona, attorneys for the defendant, and Gregg A. Young, attorney for the plaintiff, were and are authorized to enter into said stipulation in open court, and said stipulation so entered into in open court is hereby fully approved, and

It is further ordered, adjudged and decreed that the defendant, Edward J. Kazubowski, shall pay to the plaintiff, Betty Dolar Kazubowski, the sum of $5,000.00 on or before the date of September 1, 1966, in cash.

It is further ordered, adjudged and decreed that the defendant shall pay to the plaintiff the total sum of $5,000.00 in full discharge and settlement of all of the rights of the plaintiff to alimony which payments shall be made periodically as follows: $1,250.00 on September 1, 1967 and a similar sum on September 1st of the years 1968, 1969 and 1970, provided that all of said payments of alimony be terminated and canceled in the event of the death or remarriage of the plaintiff prior to the due date of any such payment. That except as provided herein, the plaintiff is permanently barred from any and all additional rights to alimony.

It is further ordered, adjudged and decreed that each of the parties are hereby barred from any rights of dower, homestead or any other kind in the property of the other, except the property herein held by the plaintiff as security for the payment of the sum or sums of money provided in said stipulation and determines that the property settlement embodied in said stipulation herein is hereby approved.

It is further ordered, adjudged and decreed that each of the parties shall pay his own attorneys fees and that the defendant shall pay the unpaid court costs in this proceeding, and

It is further ordered, adjudged and decreed that the plaintiff shall pay the expenses incurred by her since November 20, 1965, and that the defendant shall have no liability for same, and the defendant shall pay the expenses incurred by him since said date, and plaintiff shall have no liability for same.

Dated this 31st day of August A.D., 1966.

/s/ Dan H. McNeal
Judge

APPENDIX E

[Filed September 15, 1966]

State of Illinois)
County of Henry)

In the Circuit Court
General Division

Betty Dolar Kazubowski
Plaintiff

v.

Edward J. Kazubowski
Defendant

No. 65 D 1240

Order

Now the above cause comes on for hearing upon the amended objections to the decree of August 31, 1966 and upon the petition for citations filed herein and the plaintiff appears in person and by her attorney and defendant appears by Anna A. Phelps, his attorney and the court finds it has jurisdiction of the subject matter and the parties hereto and hear the testimony of witnesses sworn and examined in open court and the arguments of counsel for the respective parties and on consideration thereof.

It is ordered, adjudged and decreed that the amended objections to the decree of August 31, 1966 be and they are overruled; and

It is ordered that the petition for citation be allowed after hearing on the petition and answer,

And the court finds the defendant in contempt for willful failure to pay $4,900 on September 1, 1966. And the court allows the sum of $500.00 for plaintiff's attorneys fees to be paid instanter and,

It is ordered that defendant Edward J. Kazubowski be and he is hereby in willful contempt of this court and he is hereby committed to the County Jail of Henry County

for a period of six months unless or until $5,400 is paid to plaintiff or her attorney.

It is further ordered that the clerk of the Circuit Court of Henry County, Illinois issue a mittimus directing that the respondent Edward J. Kazubowski be taken into custody by the sheriff, and that he be and he is hereby committed to the common jail of Henry County, Illinois for a period not to exceed six months from this date, unless he shall sooner purge himself of his contempt whereof he is hereby committed, by paying to the plaintiff Betty Dolar Kazubowski or to the sheriff of Henry County, Illinois for her use the sum of $5,400.00 or unless he shall sooner be discharged by due process of law.

Dated this 15th day of September, 1966.

DAN H. McNEAL
Judge

APPENDIX F

[Filed September 23, 1966]

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

FROM THE CIRCUIT COURT OF THE COUNTY OF
HENRY, ILLINOIS

BETTY DOLAR KAZUBOWSKI,
Plaintiff-Appellee

vs.

No. 65 D 1240

EDWARD J. KAZUBOWSKI,
Defendant-Appellant

ORDER RE EQUITABLE ALIMONY AND ATTORNEY'S FEES

Now this cause comes on for hearing upon the petition of Betty Dolar Kazubowski, plaintiff-appellee in the above entitled cause, and upon the limited entry of appearance of Anna A. Phelps, appearing on behalf of Edward J. Kazubowski, the defendant-appellant in the above entitled cause, and the court finds:

1. That it has jurisdiction of the parties to this cause and of the subject matter.

2. That the defendant is not entitled in this proceeding to enter a limited and special appearance and overrules the motion for leave to do so.

3. That the plaintiff is without funds to conduct the defense of the appeal herein and has no funds with which to live during the period of the appeal in the Third District of the Illinois Appellate Court.

4. That the defendant-appellant is well able as a practising professional man to support the plaintiff herein during

the period of defendant's appeal of the decision of this court.

5. That the defendant-appellant is in charge of and in possession of all of the property owned by the plaintiff and the defendant and that the plaintiff has not any portion of said property available to her.

6. That the plaintiff has no funds whatsoever with which to employ an attorney to conduct the defense of the appeal brought by the defendant herein.

7. That the sum of $70 per week beginning this day is a proper and equitable amount to support the plaintiff during the period of said appeal and until a decision is made by said appellate court.

8. That upon evidence heard in open court the attorney for the plaintiff herein is entitled to the sum of $1,750 for research, preparation of a brief and argument and to finance the preparation of printing briefs and argument in conformity of the rules of the appellate court. And the court being fully advised in the premises and on consideration thereof it is ordered, adjudged and decreed

1. That the defendant be and he is hereby ordered to pay the sum of $70 as equitable alimony this day and each week thereafter until the further order of the court to the plaintiff, Betty Dolar Kazubowski.

2. It is further ordered, adjudged and decreed that the said Edward J. Kazubowski be and he is hereby ordered to pay to Gregg A. Young, attorney for the said plaintiff the sum of $1,750 payable as follows: $500 instanter, $500 in two subsequent payments and a final payment of $250 and that said payments shall be made beginning this day and each week thereafter in those amounts until the said sum is fully paid and discharged.

Dated this 23rd day of September 1966.

/s/ Conway L. Spanton

APPENDIX G

[Filed October 20, 1966]

IN THE CIRCUIT COURT OF HENRY COUNTY
14TH JUDICIAL DISTRICT
GENERAL DIVISION

STATE OF ILLINOIS)
COUNTY OF HENRY) SS

Betty Dolar Kazubowski,
Plaintiff

vs. NO. 65 D 1240

Edward J. Kazubowski,
Defendant

ORDER OF COMMITMENT

Now this cause comes on for hearing upon the rule to show cause entered against the defendant, Edward J. Kazubowski, entered on October 4, 1966 by this court and counsel for said defendant, Edward J. Kazubowski, having stated in open court that said defendant was informed of the requirement of said rule that he appear to show cause on October 4, 1966 and said defendant having failed to appear on said date and the court thereupon having continued said cause to October 7, 1966 and having directed that a writ of attachment issue to secure the attendance of said defendant in person and it further appears from the statements of Anna A. Phelps, counsel for defendant, Edward J. Kazubowski, has absented himself and fled from the jurisdiction of the court to avoid said writ,

It is the finding of the court that defendant, Edward J. Kazubowski, is in willful contempt for failing to appear as directed, and

It is further ordered that said defendant, Edward J. Kazubowski, is hereby sentenced to ten (10) days servitude in the Henry County jail for said contempt.

It is ordered that a mittimus issue accordingly instanter.

Dated this 7th day of October, A.D. 1966.

/s/ Conway L. Spanton

APPENDIX H

[Filed October 19, 1966]

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

FROM THE CIRCUIT COURT OF THE COUNTY OF
HENRY, ILLINOIS

Betty Dolar Kazubowski,
Plaintiff-Appellee,

vs. No. 65-D-1240

Edward J. Kazubowski,
Defendant-Appellant.

ORDER

Now this cause comes on for hearing upon the Motion For Leave To Amend the Notice of Appeal so as to include and add subsequent orders, rulings or determinations herein filed in said cause from and since the date of September 15, 1966, and further, to include and add any further subsequent orders, rulings or determinations to be entered hereinafter in said cause; and the Court being fully advised in the premises and having heard the arguments of counsel, finds that said original Notice of Appeal having heretofore been Amended, pursuant to the Order of the Circuit Court of Henry County, Illinois, to include all orders, rulings and determinations subsequent to the date of June 13, 1966, to and including, the date of September 15, 1966, and that the Decree of Divorce entered upon June 13, 1966, and all matters prior thereto, were ordered to be not included in said Amended Notice of Appeal;

That subsequent to the date of September 15, 1966, the Circuit Court of Henry County, Illinois, entered additional Orders, Rulings and determinations in said cause, and are as follows:

The Order allowing the Petition For Equitable Alimony and attorney's fees, entered upon September 23, 1966;

The Order for equitable alimony and attorney's fees, entered upon September 23, 1966;

The Order denying or overruling the Special and Limited Appearance of defendant-appellant, entered upon September 23, 1966;

The Order allowing the Application and Petition For Rule To Show Cause, entered upon September 29, 1966;

The Order For Rule To Show Cause, entered upon September 29, 1966;

The Order allowing Amendments to Notice of Appeal, entered upon September 29, 1966; and which said Order excluded the Decree of Divorce entered in said cause upon June 13, 1966, and further excluded all matters prior thereto said date of June 13, 1966;

The Order issuing a Rule To Show Cause against Anna A. Phelps, counsel for defendant-appellant and sister to defendant-appellant, signed by the Clerk of the Circuit Court of Henry County, Illinois, entered upon October 5, 1966, and said Rule To Show Cause having been entered because of a document entitled, "Petition, Motion and Affidavit For Review in the Appellate Court of Illinois, Third District", and said Rule To Show Cause having been served personally upon the said Anna A. Phelps by the Sheriff of Henry County, Illinois, on October 5, 1966;

And, the Court further finds that the Circuit Court of Henry County, Illinois has entered additional and subsequent Orders, Rulings or determinations from and since the date of September 15, 1966, and which said Orders, Rulings or determinations have been entered of record only in the minute orders of the Docket Entries, and which said Orders, Rulings or determinations may hereafter become written Orders of said Court, and are as follows:

The Order or ruling allowing the Objections to Praecipe and that portion thereof excluding the Decree of Divorce

granted to plaintiff-appellee upon June 13, 1966, and excluding all matters prior thereto, entered upon September 29, 1966;

The Order or Ruling denying the Motions For Leave To Amend the original Notice of Appeal or portions thereof, including the Decree of Divorce granted to plaintiff-appellee, upon June 13, 1966, and including all matters prior thereto, entered upon September 29, 1966;

The Order denying the Motion To Allow Leatha Williams To Act As Court Reporter, entered upon September 29, 1966, and the denial or refusal of a signature on a prepared Order, wherein it was stated that said Leatha Williams was denied to act in the place and stead of the regular Court Reporter, when said regular Court Reporter was not available to counsel for defendant-appellant;

The Order upon the Court's own Motion to vacate the Order RE Amendments To Notice of Appeal, prepared by counsel for plaintiff-appellee, entered upon October 4, 1966, on the grounds said Order was not clear and lacked clarity, and by the Order of the Court, "upon its own Motion to adopt as the Order of the Court, the Order as reflected in the docket minute Orders of September 29, 1966, RE Motions To Amend Notice of Appeal", entered upon October 4, 1966;

The Order For a Writ of Attachment to issue, entered upon September 29, 1966, "to assure presence of defendant-appellant for hearing on October 4, 1966;"

The Order entered by the Circuit Court of Henry County, Illinois, upon its own Motion to vacate the Order For Writ of Attachment, entered upon September 30, 1966, and which said Order vacating the Order For Writ of Attachment was so entered without Notice to defendant-appellant or counsel for defendant-appellant;

The Order denying the Petition For Change of Venue, entered upon October 4, 1966;

The Order denying the Motion For Continuance, entered upon October 4, 1966;

The Order denying defendant-appellant's Amended Answer To Rule To Show Cause, entered upon October 4, 1966; the Order for a Writ of Attachment to issue, returnable instanter, entered upon October 4, 1966; and said Order being issued after the Sheriff of Henry County, Illinois, appeared at the office and home of defendant-appellant before said hearing on October 4, 1966;

The Order finding defendant-appellant in Willful Contempt of failing to appear as directed, entered upon October 4, 1966;

The Order that defendant-appellant be sentenced to ten (10) days servitude in the County Jail of Henry County, Illinois, from which he cannot purge himself, entered upon October 7, 1966;

The Order that a Mittimus For Contempt issue, entered upon October 7, 1966;

The Order entered upon the Court's own Motion of a Rule To Show Cause against Anna A. Phelps, counsel for defendant-appellant and sister to defendant-appellant, entered upon October 4, 1966, and said Rule To Show Cause having been entered because of a document entitled "Petition, Motion and Affidavit For Review in the Appellate Court of Illinois, Third District".

The order setting the Hearing on the Rule To Show Cause against Anna A. Phelps, counsel for defendant-appellant and sister to defendant-appellant, upon the date of October 18, 1966, and upon a continuance thereof to November 14, 1966;

And, the Court further finds that additional and subsequent Orders, Rulings and determinations may hereinafter be entered in said cause;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all additional and subsequent Orders, Rulings or determinations from the date of September 15, 1966, as hereinabove described and specified be, and the same are allowed to be included in the Amended Notice of Appeal.

and that said Amendments of the additional and subsequent Orders, Rulings or determinations specify the relief prayed therefore;

AND, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all additional and subsequent Orders, Rulings and determinations entered hereinafter in said cause from the date of September 15, 1966, be, and the same are hereby allowed to be included in an Amended Notice of Appeal; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the additional and subsequent Orders, Rulings and determinations herein allowed shall include any of the Orders, Rulings and determinations from the minute Orders of the Docket Entries, irrespective of when said Orders, Rulings and determinations are filed is said cause;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Praecipe For Additional Record be filed in said cause to conform with the additional and subsequent Orders, Rulings or determinations entered in said cause, from and since the date of September 15, 1966, or hereinafter to be entered herein in said cause; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Motion may be presented to this Court for additional Supersedeas as to the additional and subsequent Orders, Rulings and determinations, entered in said cause from and since the date of September 15, 1966, and that the amount and the conditions thereof be fixed by this Court.

S/ George O. Hebel
Judge of the Circuit Court of
Henry County, Illinois

Enter: October 19, 1966

APPENDIX I

[Filed October 25, 1966]

IN THE CIRCUIT COURT OF HENRY COUNTY
14TH JUDICIAL DISTRICT
GENERAL DIVISION

STATE OF ILLINOIS)
COUNTY OF HENRY) SS

Betty Dolar Kazubowski,
Plaintiff

vs.

NO 65 D 1240

Edward J. Kazubowski,
Defendant

ORDER OF COMMITMENT FOR CONTEMPT

This matter coming on this day to be heard upon the rule to show cause heretofore entered herein on the 29th day of September, 1966, and the respondent to said rule being present in open court by his counsel and the petitioner being also present in open court in person and represented by counsel, and the court having heard all of the testimony of the parties hereto and being fully advised in the premises finds that it has jurisdiction both of the subject matter and of the parties to this cause; finds further that at the time of the entry of said rule there was due and unpaid under the order entered September 23, 1966, the sum of $570, but that there is now due the sum of $2,030 for equitable alimony and attorney's fees for the appeal pending; that no sufficient cause is shown by the respondent, Edward J. Kazubowski, why the same should not have been paid, or that he has been or is unable to pay the same, but that he, although well able so to do, has willfully and in contempt of this court failed and refused and still refuses to pay to the petitioner, Betty Dolar Kazubowski, the sum of $2,030 for alimony and attorney fees;

It Is Therefore Ordered, Adjudged and Decreed that the respondent, Edward J. Kazubowski, is guilty of willful contempt of this court, for his willful failure to pay to the petitioner the sum of $2,030, due and unpaid as aforesaid from him to the petitioner, Betty Dolar Kazubowski;

It is Further Ordered that the clerk of the Circuit Court of Henry County, Illinois issue a mittimus directing that the respondent, Edward J. Kazubowski, be taken into custody by the sheriff, and that he be, and he is hereby committed to the common jail of Henry County, Illinois, for a period not to exceed six (6) months from this date, unless he shall sooner purge himself of his said contempt whereof he is hereby committed, by paying to the petitioner, Betty Dolar Kazubowski, or to the sheriff of Henry County, Illinois, for her use the sum of $2,030 or unless he shall sooner be discharged by due process of law.

Dated this 25th day of October, 1966.

/s/ Conway L. Spanton
Judge

APPENDIX J

BE IT REMEMBERED, that afterward, on the 29th day of September, A. D. 1966, the same being still one of the regular Court days, the following, among other proceedings, was had and duly entered of record, in the words and figures as follows, to-wit:

Officers present:

Honorable Conway L. Sapnton, Associate Judge
James B. Fulton, State's Attorney
Dean Leander, Clerk pro tempore
Loy E. Ray, Sheriff.

Betty Dolar Kazubowski

v. 65-D-1240

Edward J. Kazubowski

COMPLAINT FOR DIVORCE

On this day is filed Motion for leave to Amend and Add Subsequent Orders, w/proof of service,

Answer to Objections to Praecipe,

Answer to Petition for Rule to Show Cause and Application for Rule to Show Cause, and

Motion to permit Leatha Williams to be Court Reporter.

Hearing is held in this cause on this same day, and the following docket entry is made:

"September 29, 1966—Motion re. Court Reporter heard and denied. (CLS)"

"September 29, 1966—Motion to Amend Notice of Appeal heard and allowed except as to matters of up to and including final Decree of Divorce entered June 13, 1966. Objections to Praecipe heard and sustained as to said matter. (See Order re Motion) CLS"

SUPREME COURT, U. S.

FILED

FEB 15 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner,

vs.

BETTY DOLAR KAZUBOWSKI,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

PAUL A. CUSHMAN
Baker Building
Kewanee, Illinois 61443

GREGG A. YOUNG
103 South Tremont Street
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CAMPBELL ANDREWS
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Counsel for Respondent

MIDWEST LAW PRINTING CO., CHICAGO (60601), FINANCIAL 6-2900

In The

Supreme Court of the United States

October Term, A.D. 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner,

vs.

BETTY DOLAR KAZUBOWSKI,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

This cause should not be reviewed by this Court because the allegations of want of due process in the Trial Court and Appellate Court are unsupported by the facts in the record.

I.

The Constitutional Questions Were Not Timely Or Properly Raised So As To Give This Court Jurisdiction.

The objection to the decree of August 31, 1966, and the stipulation on which it is based, the question of the absence of the divorce decree and divorce trial testimony from the record on appeal in the Appellate Court, the propriety of the order of September 23, 1966, for alimony pending the appeal, and the adequacy of the record on

appeal in the Appellate Court were all before the Appellate Court for consideration on the appeal, and there is no reason why the petitioner could not have raised his constitutional questions in that court. Such questions must be raised at the first opportunity. *Brinkerhoff Faris Trust Co. v. Hill*, 281 U.S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313.

Raising the federal questions in the petition for leave to appeal to the Supreme Court of Illinois, which was denied without opinion, is too late. Raising such questions after the final review in the State Court does not give this Court jurisdiction unless the State Court decided the federal question raised or the grounds of the decision of the State Court are such that petitioner had no previous opportunity to raise his federal question. *Great Northern R.R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 32 Am. Jur. 2d Federal Practice and Procedure, Sec. 261 (1967).

II.

The Decree Of August 31, 1966, Was Entered After A Full Hearing Without Violation Of Petitioner's Right To Due Process Of Law.

The decree of August 31, 1966, dividing the property between petitioner and respondent was based on a stipulation signed by counsel for both parties and filed and approved in the Trial Court on August 15. The recital in the decree (App. 15, of Petition) concerning a letter from Perona and Perona to Gregg A. Young dated July 27, 1966, about the family dishes, indicates that negotiations began at that time, two days after Mr. Perona appeared for petitioner under the circumstances described in his motion for continuance of the property hearing from July 25 to August 15 (R. 8, 9, 10 and 11).

After the stipulation was filed, the presentation of the decree was set for August 31, during which time petitioner was fully informed of the stipulation and the proposed decree, as shown by his motion to amend the stipulation filed August 31, 1966, and the numerous exhibits consisting of letters and documents and his affidavit of other circumstances (R. 21 to 58).

Petitioner did not claim in his motion that the stipulation was signed without authority but that in the four page stipulation one word was changed without his consent. The change of the word "mortgage" to the word "lien" would have required him to give respondent a mortgage to secure his future payments under the decree, which mortgage would be a second lien on the Kewanee house, which was already subject to a mortgage to a loan company and a judgment lien for $10,000 in favor of the mother of petitioner.

The recitals in the decree (App. 11, of Petition) show that the motion to amend the stipulation or "void said stipulation" was denied and the stipulation again approved and the decree entered after a full hearing of the matter at which petitioner was present. The authority of Mr. Perona to sign the stipulation and present the decree was challenged in open court by petitioner's motion. By its action the Court decided that the stipulation represented the agreement of the parties and that its execution and filing by Mr. Perona was authorized. In response to petitioner's objection that he could not give a mortgage to respondent which would be a second lien, the Court in its decree provided that respondent might retain her interest as a joint tenant in the real estate until petitioner gave her a mortgage which was a second lien.

Mr. Perona did not make a settlement of petitioner's case without authority as charged by petitioner, and the question of his use of the word "lien" instead of the word "mortgage" was submitted to the Trial Court in an open hearing after notice to petitioner, giving him sufficient time to prepare and present written objections on the subject. The Trial Court is the proper forum in which to determine the extent of the authority of an attorney for a party to a case. 7 C.J.S. 884, Attorney and Client, Sec. 74. The record shows the proceedings meet all the requirements of due process of law.

III.

The Order Of September 26, 1966 Was Proper.

In Section 16, Chapter 40, Illinois Revised Statutes of 1965, it is provided:

> "In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper."

Petitioner's complaint is directly contrary to the foregoing statute in Illinois. The court over several hearings knew the financial status of the parties. All of the property jointly owned was in the exclusive possession of petitioner and respondent was unemployed and impecunious. She was not able to support herself or hire attorneys to meet petitioner's appeal with its attendant expense for briefs, printing, and lawyers in an appellate court. The trial court sought to even up the scales so respondent could compete with a chance of sustaining her position.

The order of September 26, 1966 was not a penalty but followed a valid Illinois statute equalizing the chances of a fair presentation of respondent's claims in an appellate court. It involves no constitutional question of due process.

IV.

Petitioner Had A Fair Opportunity To Appeal Under The Illinois Statute And Rules Of Court.

Petitioner filed a notice of appeal on September 15, 1966, specifying the decree of August 31, 1966 (R. 92). Rule 33 of the Illinois Supreme Court required that the order or decree appealed from be specified. Chap. 110, Sec. 101.33(2) Ill. Rev. Stat. 1965. No other order or decree was specified.

Supreme Court Rule 36 required petitioner to file a praecipe with the clerk of the trial court designating what parts of the trial court record were to be incorporated in the record on appeal. Chap. 110, Sec. 101.36(1). Petitioner filed a request for the entire record of the case (R. 124 and 125). Rule 36 provided that the clerk should make up the record on appeal as soon as all the necessary copies or originals of the records and documents specified in the praecipe were in his possession.

Under these rules the judges and other parties have no power to limit the contents of the record on appeal, and as a practical matter the clerk always certifies all correct copies of his records which may be delivered to him by the appellant. If a report of trial proceedings is specified, Rule 36(1)(c) provides that the testimony and rulings desired by appellant shall be presented to the trial judge for his certificate of correctness and filed in the trial court.

Petitioner was entirely responsible for his record on appeal. There is no indication that the clerk of the trial court refused to certify any part of his record, or that petitioner or his attorneys were limited in any way in providing copies for the record on appeal. There is no apparent reason for the absence of the decree of divorce and the report of the divorce trial. Petitioner's claim that the divorce trial record or trial proceedings were excluded from the record on appeal is unfounded. There is no indication that he made any attempt to obtain the testimony or present any trial proceedings to the trial judge for certification, as required by the Illinois Supreme Court Rules.

The objections in the trial court to the praecipe and the docket entry by the judge on September 29, 1966, purporting to sustain objections to the inclusion of matters prior to the June 13 divorce decree, did not limit the record on appeal. The docket entry did not constitute an order of the court. *People* v. *Koning*, 18 Ill. App. 2d 119, 151 N.E. 2d 103, 106; *Mitchell* v. *VanScouk*, 1 Ill. 2d 160, 115 N.E. 2d 226, 234.

The docket entry was merely an informal notation by the judge. The record of the court is kept by the clerk. The docket for September 29 included the notation "(See order re: Motion)" (R. 156). The order in the clerk's record on the same matters made no reference to the objections to the praecipe and excluded nothing from the record on appeal (R. 170). It did not affect the petitioner or the clerk in making up the record on appeal.

In addition, there is no statute or rule of court authorizing the trial court to make orders limiting the praecipe or the contents of the record on appeal. An

order in accordance with the docket entry would have been erroneous. There is no indication that any Illinois court has ever entered such an order.

Thus the principal claim of denial of due process by the omission of parts of the trial court record from the record on appeal appears to be unfounded. The Illinois statute and rules of court permitted petitioner to provide the clerk with all such copies of the court record as petitioner desired to have included, and to file all such reports of trial proceedings as petitioner might have transcribed and certified by the trial judge. The Illinois rules provide a reasonable opportunity to review on appeal all orders of the trial court, in accordance with the accepted and usual course of judicial proceedings.

Therefore this case has no public importance and should not be reviewed by this court.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul A. Ushman,
Gregg A. Young,
Harper Andrews,
Campbell Andrews,
Counsel for Respondent.

FEB 24 1969
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner

v.

BETTY DOLAR KAZUBOWSKI,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

PETITIONER'S REPLY BRIEF

FRANK J. DELANY
RAY E. DOUGHERTY
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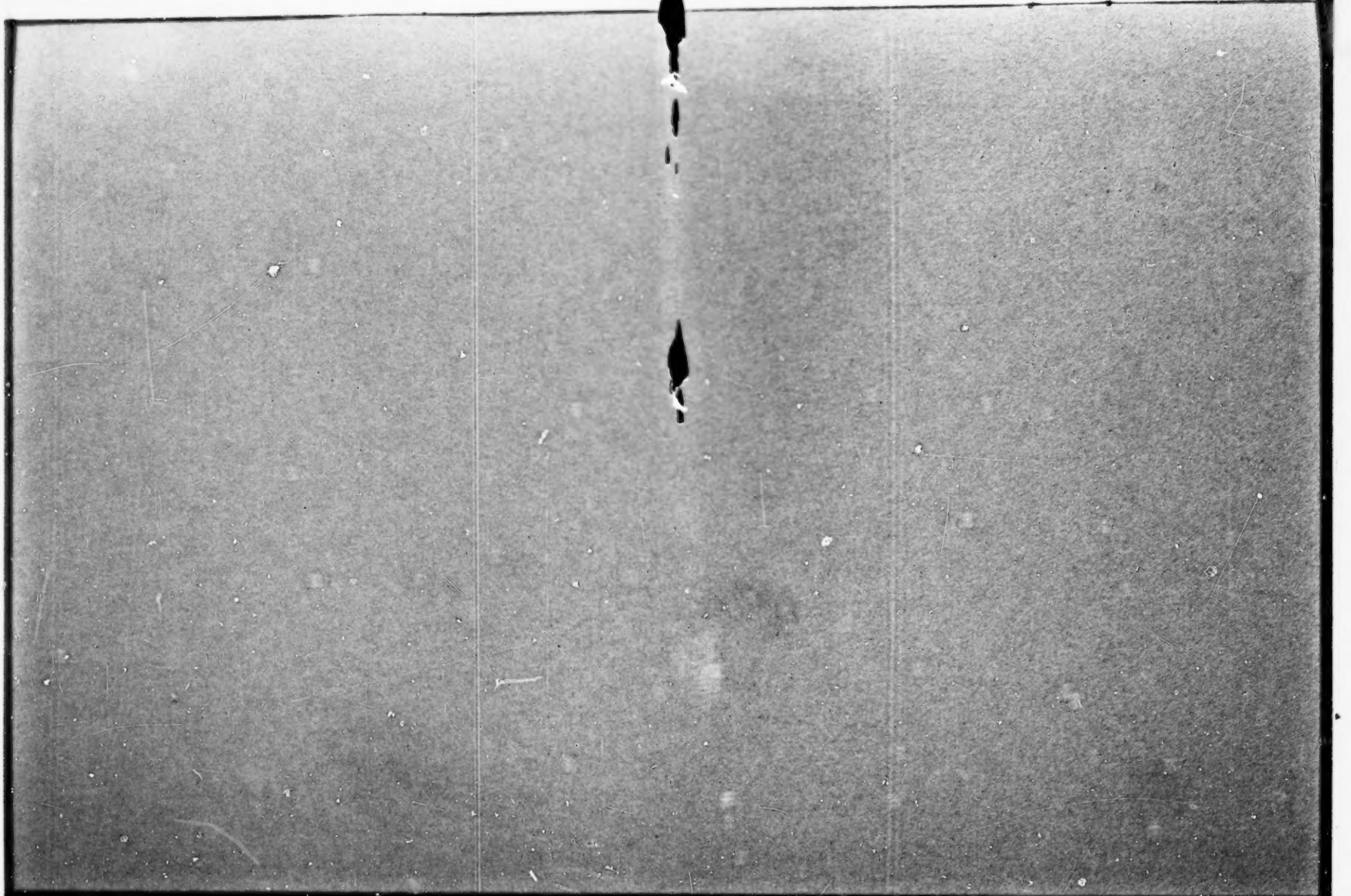
Washington, D.C. 20005
Counsel for Petitioner

Washington, D. C. - THREE PRESS - 202 - 393-0625



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner

v.

BETTY DOLAR KAZUBOWSKI,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

PETITIONER'S REPLY BRIEF

Petitioner hereby makes reply to arguments raised in respondent's brief opposing the petition, under the same roman numeral headings as the related subject is raised in respondent's argument.

I.

THE CONSTITUTIONAL QUESTIONS WERE TIMELY RAISED

Respondent's answer supplies logic and reason to petitioner's demonstration that the constitutional questions were timely raised. In part IV of her answer, respondent reviews in detail the provisions of Illinois statutory procedure and related rules of the Supreme Court, and then concludes:

> "Under these rules the judges and other parties have no power to limit the contents of the record on appeal. . .
>
> * * *
>
> ". . . . In addition, there is no statute or rule of court authorizing the trial court to make orders limiting the praecipe or the contents of the record on appeal. . ."

In part III of her answer, as demonstrated herein, respondent concedes that the penalty imposed on petitioner for exercising his right to appeal was indefensible, by failing to defend it. The order fixing lump sum alimony and providing a property settlement, in full satisfaction of all alimony claims, could not coexist with the order providing additional alimony pending appeal.

Petitioner therefore had no reason to anticipate that the Appellate Court would not follow established law of the state of Illinois in deciding his appeal to it. There was neither need nor occasion to invoke the Constitution of the United States until after the Appellate Court had decided the case, and thereby exhausted plaintiff's opportunity to obtain further review as a matter of right.

II.

THE DECREE OF AUGUST 31, 1966 WAS ENTERED WITHOUT GRANTING PETITIONER THE FULL HEARING TO WHICH CONSTITUTIONALLY ENTITLED

Respondent's argument in support of the decree of August 31, 1966 misstates the record, in her description of petitioner's motion, directed against the unauthorized stipulation.

The decree of August 31, 1966 was entered after presentation to the trial court of petitioner's written Motion To Amend Stipulation Or In The Alternative To Void Stipulation, with its supporting papers. Those papers included a detailed affidavit by petitioner, setting forth specifically all conversations and negotiations relating to the authority given Mr. Perona, who had executed the stipulation in petitioner's name, as well as a positive and specific denial of any authority having been conferred on Mr. Perona to make the change in the stipulation relating to the second lien.

The supporting papers included a motion prepared by Mr. Perona to amend the stipulation (R 53-54), and an affidavit Mr. Perona had prepared for execution by petitioner. (R 55) Mr. Perona's motion recited:

> "1. That the attorney for this defendant who executed said stipulation was not authorized by this defendant to agree that the trust deed provided for therein was to constitute a second lien on said real estate."
>
> * * *
>
> "3. That if the words 'which shall constitute a second lien' are not eliminated from said stipulation, the provisions of said stipulation do not constitute the agreement of this defendant and the entire stipulation should be voided and of no effect."

The affidavit prepared by Mr. Perona stated:

"1. That this defendant authorized Attorney Louis J. Perona to agree that the future payments agreed to between the parties was to be secured by a trust deed on the real estate in Kewanee, Illinois, owned by the parties but did not authorize said attorney to agree that said trust deed would constitute a second lien on said real estate.

"2. . . . this defendant would be unable to deliver to the plaintiff a trust deed which will constitute a second lien on said real estate and for this reason has never authorized his attorney to agree to same on his behalf."

The factual showing made by petitioner's motion and supporting papers was not controverted by any evidence, nor by counter-affidavit. There was no basis whatever for the trial court's finding that petitioner consented to the decree. The stipulation which supposedly embodied his consent was unauthorized because containing an unauthorized provision. Had respondent been willing to have the stipulation amended by elimination of the unauthorized [redacted] there would have been consent, but she was unwilling to do so.

Respondent would have this court close its eyes to the unsupported determination that the stipulation was authorized, asserting that the "Trial Court is the proper forum in which to determine the extent of the authority of an attorney for a party to the case."

Such an abdication of judicial duty would of course open the door to judgments and decrees entered without due process of law, as was this one. Such a suggestion is on a par with respondent's assertion, in her brief to the Appellate Court, impliedly suggesting that weight should be given to a decision because "written by the trial judge while a member of this court . . ." (Appellee's Brief, p. 9). There should be objective review of the action of the trial court, without regard to the court or courts on which he has sat.

III.

THE DECREE OF AUGUST 31, 1966 PENALIZED PETITIONER FOR EXERCISING HIS RIGHT TO APPEAL AND THEREBY DENIED HIM DUE PROCESS OF LAW

Here respondent's answer deals with a false issue of her own making, and defaults on the true issue. Although more than liberal, petitioner did not challenge the provisions of the decree of August 31, 1966 awarding respondent attorney's fees and costs of appeal. They were not plainly and uncontrovertibly a penalty imposed on petitioner for taking an appeal.

The weekly alimony awarded respondent was such a penalty, because it was added to, rather than credited upon the lump sum alimony, which, with a property settlement, had previously been decreed by the court as in full satisfaction of all her claims for alimony.

It would have been a simple matter to have provided for such credit. In *Goldstine v. Goldstine*, 25 Ill. App. 2d 319, 167 N.E.2d 30 (1960), temporary alimony, pendente lite, was so credited. Had this been done there would have been no penalty imposed upon petitioner, and respondent's interests would have been fully protected.

IV.

PETITIONER WAS DENIED A FAIR APPEAL BY DENIAL OF THE RECORD DEEMED BY HIM NECESSARY FOR SUCH APPEAL

Respondent misstates the record in treating the docket entry of September 29, 1966 as if "an informal notation by the Judge", in his private notes, made for his personal convenience.

The docket entry recorded official action by the court, in the official record, maintained for that purpose. The

clerk's certificate preceding the entry, and the entry, (App. 30, R 156) read as follows:[1]

> "BE IT REMEMBERED, that afterward, on the 29th day of September, A.D. 1966, the same being still one of the regular Court days, the following, among other proceedings, was had and duly entered of record, in the words and figures as follows, to wit:
>
> Officers present:
> Honorable Conway L. Spanton, Associate Judge
>
> * * *
>
> "September 29, 1966—Motion to Amend Notice of Appeal heard and allowed except as to matters of up to and including final Decree of Divorce entered June 13, 1966. Objections to Praecipe heard and sustained as to said matter. (See Order re Motion) CLS",

The meaning of the entry sustaining objections of respondent is clear, in the light of those objections, (R 138) which stated:

> [redacted]
>
> Now comes the plaintiff-appellee and objects to the praecipe served upon him (sic) September 21, 1966 and to that portion thereof which requires the Clerk of this court to prepare a copy of the records for those pleadings and portions that precede August 31, 1966 for the reason that all of said events are concluded and the time for appeal has passed and in the absence of an order or direction from the Appellate Court of the State of Illinois, Third District, all of said matters preceding August 31, 1966 are immaterial and irrelevant to thsi appeal."

The status of the docket entry as an official record of the court is also established by the clerk's certificate (R

---

[1] The initials of the judge indicate that he made the entry. The direction to see the "Order re Motion" obviated the necessity of any other docket entry relating to that order on file. The entry appears twice in the trial court record—once at R 156, and again in the photocopy of the docket pages relating to the case in the circuit court, R 417.

412) where he attest the record of trial court proceedings "to be a true, perfect and complete copy of all records and proceedings beginning July 8, 1966 through December 8, 1966 in the matter of Betty Dolar Kazubowski v. Edward J. Kazubowski, Chancery case No. 65D-1240 as they appear from the Records and Files of said Court now in my office remaining."

That status is further confirmed by the order of October 19, 1966 (App. H, p. 23-27) which allowed the notice of appeal to be amended so as to extend to orders subsequently entered, including the docket entry in question.[2]

Respondent's ~~Defendant's~~ contention that there was no official record of an order sustaining his objections to the praecipe is patently untrue.

Nor can fault be found with the docket entry because made by the judge in his own hadnwriting. A docket entry normally is made by the clerk in brief form; some times it is accompanied by a more formal, expanded order, as a protection against error by the clerk in summarizing the order of the court.

When the judge who made the judicial determination personally makes the entry in the official docket, the possibility of such error is avoided. There is no need for another duplicating order, on a separate paper. Were there need for

---

[2]That order provided in part (App. p. 24):

". . . the Court further finds that the Circuit Court of Henry County, Illinois, has entered additional and subsequent Orders, Rulings, or determinations from and since the date of September 15, 1966, and which said Orders, Rulings or determinations have been entered of record only in the minute orders of the Docket Entries, and which said Orders, Rulings or determinations may hereafter become written Orders of said Court, and are as follows:

"The Order or ruling allowing the Objections to Praecipe and that portion thereof excluding the Decree of Divorce granted to plaintiff-appellee upon June 13, 1966, and excluding all matters prior thereto, entered upon September 29, 1966;"

such an order, the responsibility to have it entered would have been respondent's under the rule of the Circuit Court of Henry County requiring the prevailing party to prepare such an order. (App. B, p. 2)

In view of the order sustaining objections to the praecipe, the clerk in preparing and certifying the record had no choice but to obey it. By statute (Ill. Rev. Stat. 1967, ch. 25 Sec. 13), clerks of court are required to "perform all duties pertaining to their own offices as may be required by law or the rules and orders of their courts respectively." The clerk is subject to judicial control, but possesses no judicial powers,being a ministerial officer of the court, and subject to contempt for failure to obey court orders. *People v. Windes*, 275 Ill. 108, 113 N.E. 949 (1916); Ex Parte Thatcher, 7 Ill. 167 (1845); *Village of Melrose v. Barnard*, 126 Ill. 496, 18 N.E. 671 (1888).

Respondent relies on *People v. Koning*, 18 Ill. App. 2d 119, 151 N.E. 2d 103, and *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 115 N.E. 2d 226. Both of those cases involved personal notes of the judge, rather than official records of court action, and are plainly inapplicable.

CONCLUSION

Respondent to the contrary notwithstanding, the decision of the Appellate Court, effectively allows a trial court to shorten the record on appeal, so as to preclude review of its orders. The integrity of appellate review is thereby jeopardized by this precedent.

Respectfully submitted,

FRANK J. DELANY
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815 - 15th Street, N.W.
Washington, D.C. 20005

Counsel for Petitioner